EXHIBIT 12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 43

----------X

THE PEOPLE OF THE STATE OF NEW YORK BY LETITIA JAMES ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

- against - INDEX # 452353/2018

AARON D. FISCHMAN, STEPHEN BROWN, STEVEN HOFFMAN, LAWRENCE KATZ, SETH ROSENBLATT, CARDIS ENTERPRISES INTERNATIONAL N.V., CARDIS ENTERPRISES INTERNATIONAL (U.S.A.) INC., CARDIS ENTERPRISES INTERNATIONAL B.V., CHOSHEN ISRAEL LLC, LAW OFFICES OF LAWRENCE KATZ, ESQ. PLLC, LAW OFFICES OF LAWRENCE KATZ P.C. and ZERP LLC

Defendants.

- And -

NINA FISCHMAN, RAFAELA FISCHMAN, ALEXANDER FISCHMAN, STUART FISCHMAN, ANNE SHIMANOVICH and ETHEL WEISSMAN.

Relief Defendants.

----------X

Motions Seq. 11, 12, 13, 15

August 3, 2023
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE ROBERT R. REED,
Justice of the Supreme Court

A P P E A R A N C E S:

OFFICE OF THE ATTORNEY GENERAL - LETITIA JAMES
Attorneys for the Plaintiff
28 Liberty Street
New York, NY 10005
By: LAUREN MCDONOUGH, ESQ.
R. VERLE JOHNSON, ESQ.

mlp

A P P E A R A N C E S: (Cont'd)

CLAYMAN ROSENBERG KIRSHNER & LINDER LLP
Attorneys for Stephen Brown
305 Madison Avenue, Suite 650
New York, NY 10165
By: BRIAN LINDER, ESQ.
THOMAS DOLLAR, ESQ.

BIENENFELD LAW
Attorneys for Defts. Hoffman, Zerp, Rosenblatt
680 Central Avenue, Suite 108
Cedarhurst, NY 11516
By: SAUL BIENENFELD, ESQ.

LAW OFFICE of LAWRENCE KATZ
Attorneys for the Defendant
488 Empire Blvd, Suite 101
Brooklyn, NY 11225
By: LAWRENCE KATZ, ESQ.

MICHELE PANTELOUKAS
Senior Court Reporter

COURT OFFICER: All rise. Part 43 is now in session. The Honorable Robert Reed now presiding.

Come to order. Be seated.

THE COURT: If I could have appearances, plaintiff first, please.

MS. MCDONOUGH: Assistant Attorney General Lauren McDonough for the Office of the Attorney General, here with my colleague Assistant Attorney General Verle Johnson.

MR. LINDER: Good morning, Your Honor.

Brian Linder, Clayman Rosenberg Kirshner & Linder for the defendant Stephen Brown. With me is my colleague, Thomas Dollar, who will be arguing the motion on behalf of Mr. Brown.

MR. BIENENFELD: Good morning Your Honor.

Saul Bienenfeld for defendants Steven Hoffman, Seth Rosenfeld and Zerp LLC.

MR. KATZ: Good morning, Your Honor.

I am Lawrence Katz, a defendant herein. 48 Empire Boulevard suite 101, Brooklyn, New York.

THE COURT: Let's begin and start with motion sequence number 11.

MR. DOLLAR: Your Honor, would you like me to stand at the lectern.

THE COURT: Whatever you are comfortable with.

The lectern has the benefit of having the mic right there, but some people want to be able to look down at their paperwork. It is your choice, as long as you can project and make sure the court reporter can hear what you say.

MR. DOLLAR: I think I'll stand here, my papers don't spread out at the lectern, Your Honor.

Good morning. Thomas Dollar, Clayman Rosenberg Kirshner and Linder representing defendant Stephen Brown.

Plaintiff's amended complaint suffers from the same defects as its original complaint did. And as such, all four claims against Mr. Brown should be dismissed for failure to state a cause of action, and this time with prejudice.

We are in a rerun of where we were just over four years ago when we were before the previous Judge assigned to this case, Justice Sherwood.

Justice Sherwood's July 15, 2019 decision and order incorporated by reference the transcript of the oral argument that happened that same day. Justice Sherwood at that oral argument noted the many faults with plaintiff's original complaint: That it engaged in group pleading. That it failed to distinguish between the various Cardis entities, lumping them all together as one entity called Cardis. And not noting that Defendant Brown was never an officer of Cardis N.V. -- as in Nancy Virginia -- which

was the loan entity that issued shares.

He noted the lack of specificity: What was it that Mr. Brown did that was actionable? What sort of communications or omissions did he do? And what did he do with them? Did he offer them? Did he help offer them? Did he circulate them?

These communications were not material. That is, that they were not the sort of communications that a reasonable investor would use in making an investment decision. In fact, they were not more than good faith predictions and forward-looking statements.

What sort of mental state did Stephen Brown have with respect to the common law fraud claim which was in there and still is in there? That requires scienter. That requires knowledge that the statement is false and intent to induce reliance.

With respect to the Martin Act, the Executive Law and the equitable fraud claims, that requires a failure to have undertaken a reasonable investigation.

And finally, with respect to the Common Law claims, it requires that the investors have relied on the representations and undertaken some action.

Now, back then four years ago, the plaintiff understood in the briefing of the original motion to dismiss that its complaint was deficient. It didn't do

these things. So it attempted to replead in its briefing papers. And this was something that Justice Sherwood called them out for, that they were repleading this. They tried to refashion the Martin Law as a strict liability statute. Despite the fact that only several years earlier, in a 2012 brief before the Court of Appeals in the People versus Greenberg case, they took the position, quoting an old case, *People v Federated Radio*, that what is required is failure to undertake a reasonable investigation. What they said in their footnote 50 is: "Of course, the absence of the scienter requirement under the Martin Act and Executive Law 63(12), does not mean that a false statement is actionable, regardless of whether the speaker had means to know of its falsity."

And then in the main body they said: "Thus, Greenberg may be held liable because at least he reasonably could and should have known that the transaction he personally negotiated with Jen Ray's (ph.) CEO was a fraud." See *Federated Radio*, 244 NY at 40 to 41 (The Martin Act imposes a duty of "reasonable investigation.")

Now, despite having represented that to the Court of Appeals in 2012 before Justice Sherwood, they took the opposite position. They said that *Federated Radio* in fact requires a strict liability for Martin Act

claims. And they took the position that an officer is not -- for a Martin Act claim, the fact that an officer under Business Corporation Law 715(h) is allowed to rely in good faith on statements given to him by another officer, they took the position before Justice Sherwood that this has no bearing on a Martin Act claim.

And Justice Sherwood rejected this. He said, and I am quoting him: "Wait a minute, every time that General Electric, I know there is something there --

Pardon me. Page 21 of the transcript.

"Every time that an Executive Vice President of General Electric goes out and makes a statement, she has to individually go out and check to make sure that whoever provided her with information was not lying to her?"

The Assistant Attorney General at the time Mr. Novak: "The Martin Act is not concerned with what level investigation has been done, it is remedial statute and it focuses on whether there is a material misstatement."

Justice Sherwood: "Are you trying to tell me if you can allege that the statement is a material misstatement then that executive has to go out for herself and make sure that her colleague didn't lie to her? That's what you are telling me?"

Mr. Novak: "Yes, Judge. They are on the hook."

Justice Sherwood: "What is left of the Business Corporation Law?"

Mr. Novak: "The Business Corporation Law does not speak to the Martin Act. And you know, we found no case concerning" --

Justice Sherwood: "Can she rely on the Business Corporation Law in the provision that allows you to rely on a reasonable representation of your colleagues?"

Mr. Novak: "Our position is, no, they may not."

The Court: "That doesn't help us. How can American business possibly function under the regime that you are relying on?"

So Justice Sherwood clearly rejected these arguments. He gave them -- he gave the People leave to replead. But he did so under a narrow parameter. He cautioned, the last page of the transcript, page 39, he addressed Mr. Novak again and said: "And to the extent that you are going to be making against him, Mr. Dollar" -- meaning me, meaning Defendant Brown -- "make sure, I am not deciding it but I am giving you ahead, with respect to pleadings that you may come back, Mr. Dollar made an important point, I think, saying: Brown, who is an officer of the company but not the company specifically, the company that had interactions with investors. Now, whether that's true or not, but you

may want to pay attention to that. All right."

So flash forward. They filed their amended complaint. Do they correct these numerous errors in the originally complaint? No. They don't. They don't. What they do is they file an amended complaint that, once again, lumps Cardis in as one entity without distinguishing between the Cardis entity that issued shares and the ones that didn't, without acknowledging that Mr. Brown was never an officer of the Cardis entity that issued shares.

Paragraph 14 of the complaint they say that, again, they will refer to the Cardis entities as simply as "Cardis" throughout this complaint. And then repeatedly with respect to Mr. Brown, referring to him as an officer of Cardis. Again, without specifying. Again, even though Justice Sherwood said, if you are going to do this over again, you need to -- you need to be clear about this. Because without this level of specificity you do not state a Martin Act claim.

And so really what we have here is what is and what is not different in the amended complaint. Well, what we now have with respect to Mr. Brown is this itemized list of communications. What plaintiff is saying is, well, we have corrected all of our defects because now we have itemized the list. You asked for specificity, an

itemized list is specificity. But no. Let's look at what is on the itemized list. So if we look at paragraph 132 of the amended complaint: As discussed above (*see supra* at paragraph 49) -- which is a paragraph that was in the original complaint -- Defendant Brown prepared fraudulent projections that he distributed or caused to be distributed to others."

And then we have sub-bullet points a. through m., each one is a different communication referring to what is called "the same false financial projections" being emailed by Mr. Brown to various unnamed people. But that's not sufficient to state a Martin Act claim, much less a Common Law fraud claim that requires scienter.

What are the false financial projections? What is false about them? What are the projections? What is material about this communication? You know, you have itemized this list of communications, but there is no meat there. There is no -- there is nothing to this allegation other than an enumerated list of communications.

And then when we -- when the amended complaint does refer to communications themselves, and it does so excerpting them, not including the entire communication and the standard for materiality is the entire communication in context, not the blurb of them. But looking at what they excerpted, we see a number of forward

looking statements made in good faith reliance on documents provided from Aaron Fischman or other officers or the Chief Operating Officer, Nebo Djurdjevic, not included as a defendant in the complaint.

THE COURT: You say that it is in reliance upon -- in good faith reliance. Good faith reliance is factual, isn't it? I mean, if we take -- if we take the complaint at the motion to dismiss stage, accepting their pleaded facts as true and accordingly forward them every favorable inference, your charge, your defense there is that your client acted in good faith reliance. Well, that's what the case is about. The meat of discovery is determining whether there is something that demonstrates that your client acted in good faith. It seems difficult to simply cloak the defendants accused of some level of fraud in an armor of simply saying, well, someone else told me that that was so. This is -- you know, that's the meat of the thought. Is there a reason to believe that what the person told you is true?

And just to be clear, you mentioned General Electric, well General Electric is wholly different from the parties who are involved here. There are hundreds of officers of General Electric, certainly. And so the idea that you have to verify each one of those individually, yes, that would be tough. But I don't see anything to

suggest that there are hundreds of executives who are involved here.

MR. DOLLAR: I take your point, Your Honor. If I may address it in a few ways?

Plaintiff has to make these factual allegations at the pleading stage. Here, they don't. Now, we begin with the Martin Act standard, which is, they must allege facts showing that Mr. Brown failed to undertake a reasonable investigation. That is the legal standard. That is the legal standard recognized by Justice Sherwood. That was the legal standard recognized by the Attorney General's office itself in 2012 in the Greenberg case, although they changed their position for the sake of this case. But to satisfy that legal standard, they actually have to make this allegation. And they simply don't do that. Then we -- we do have Business Corporation Law 715(h) which applies to the General Electric just as it does to a -- to a small company.

I'll refer back to language from Federated Radio back in 1920-something and I am quoting. It says: "Perfectly honorable members of the business in question are safeguarded by substantial provisions in the Act and by the power of the courts, and the law is not aimed at them." So --

THE COURT: That's true. That's true. But I

guess the point I asked you to focus on is that this is a motion to dismiss stage, not a summary judgment stage, not a trial stage. So ultimately the question is, was there reasonable reliance. That's a factual inquiry. It is a factual inquiry. How, if we accept what they say as true, how does simply trying to cloak your client in the notion that he acted in good faith upon someone else's representation, how is that enough at this point? It is very easy to simply say, this is, you know, someone told me this. Well, what if someone told you that today the sky was blue. When you looked outside and it was torrential downpours and you come in the courtroom and say, well, although I looked out the window and there were gray skies and it was torrential rain, my guy told me it was true. It is a factual inquiry. What is reasonable is the inquiry.

MR. DOLLAR: Your Honor, before we get to the factual inquiry, they actually have to make the factual allegation that he didn't. And they don't do that. They didn't do that in the original complaint. And to fill that in in the amended complaint, it is just this rote recitation.

Paragraph 141: "Defendant Brown made these statements" -- referring to everything in the complaint before that -- "recklessly, knowingly or intentionally.

Defendant Brown failed to conduct a reasonable investigation concerning the statements he was relating. Nor was it reasonable to rely on Defendant Fischman or others at Cardis. There was no basis to believe these individuals were reliable, particularly because they never supplied Defendant Brown with materials that would corroborate Defendant Brown's representations."

Now two things about that. One, that does not meet the specificity for pleading claims that sound in fraud. That is simply a conclusory rote recitation of not even one mental state, but three different mental states. I don't even know which is which with regard to recklessly, knowingly or intentionally.

Second, the last sentence there, particularly because they never supplied Defendant Brown with materials that would corroborate Defendant Brown's representations; that is contradicted by documentary evidence. That is integral to the complaint. That is not something that is being brought in from outside that would be as, I agree, Your Honor, that would be appropriate on a summary judgment motion.

But here where the complaint excerpts little communications, they have put the entire document containing the communication, is now an integral document, into the complaint. And it is something that is

appropriate to consider on the motion to dismiss.

So for example, we look at what was Exhibit F to my colleague, Mr. Linder's, affirmation which is ECF docket number 166. This is a letter sent from Mr. Brown dated December 24, 2014. It is referenced in the amended complaint, I think, a few times. It is referenced at paragraph 137 -- excuse me. 135(d).

And this document includes the information that was provided to him. It has forward-looking statements about a Cardis partnership with ByStorm. It includes expectations; statements like, most likely ventures, expected to. And you have a number of partnerships, each saying expected to, expected to. And then, as part of it you have an article from Billboard Magazine quoting Mr. Djurdjevic, the COO of Cardis, explaining what Cardis is and what it does. And then you have, as part of this integrated document, a press release from ByStorm itself saying the company is also set to release Music Mogul, a gaming app for iPhone and Androids, as well as a partnership with Cardis International, an online payment system service through their ByStorm technology venture. That's ECF 166 at page -- I don't know that it has a page number.

So you have these documents here that can be considered on a motion to dismiss, where the document

itself contradicts the document that the plaintiff has chosen to include an excerpt of; contradicts the conclusory statement about how he was never provided with materials. The materials are there. They are in the documents. So, you know --

THE COURT: The difference, Counsel, between something contradicting something that's in the complaint and something conclusively establishing that what is stated in the complaint is not true, simply having some level of contradiction in a material document, doesn't say it fully establishes a defense or utterly refutes -- utterly refutes, conclusively, what is stated in the complaint.

Go ahead, Counsel.

MR. DOLLAR: It is something that they have to allege at this stage. Not just the conclusory statement that --

THE COURT: But if they allege -- what you are saying is that they need to allege a conclusion, instead of what they have done, which is allege facts. Now, challenge those facts. Sure. But it doesn't really do any good saying that.

MR. DOLLAR: They need to allege specific facts that raise the indicia that --

THE COURT: What would that be? What would that

be? Show me a case that lays out the standard that you are talking about in detail that says that, no, they have to do -- show that they alleged these facts and these particular facts are what would show that someone had the necessary state of mind. What is that?

MR. DOLLAR: I think the case is *Federated Radio* itself. And plus the earlier decision in this case by Justice Sherwood, which is that they need to allege something.

THE COURT: Specifics. And then they have come back and they have alleged specifics. Specific documents that you can challenge. That you can sit down in discovery. The whole point of this is not to have them make charges without any factual basis. If they say these are the documents upon which I am basing my claim that this person acted knowingly and with a, you know, some level of a bad mental state, then you are able to look at those documents in discovery and challenge them point by point. If you don't put those in, then they are left with -- you are left with the task of saying, well, what do you mean he acted in this -- with this mental state. Here you have basis for defending yourselves. And that's the goal, is to make sure that the defendants have an ability to defend themselves against the charges that are being made, rather than simply saying, well, how am I

supposed to -- how am I supposed to respond to your conclusion that my client acted with scienter.

MR. DOLLAR: I think that they are required to --

THE COURT: I asked for -- when I asked the question I said show me a case that lays that out. Do you have a case that lays that out, that says these factual allegations establish the requisite pleading level required for someone's mental state, in a Martin Act case or a fraud case or a case under Executive Law?

MR. DOLLAR: I don't have a specific case giving a roadmap of --

THE COURT: Well that's what is happening here, Counsel. What you are saying is they have laid out various factual allegations, rather than simply concluding that your client acted with the requisite mental state. And what you want is factual details that demonstrate that he acted with the required mental state. And I ask, because you are making the motion, you bear the pleading burden or the burden on this motion, to demonstrate that they can't possibly, based on their allegations, they can't possibly in this case demonstrate that someone acted -- that your clients acted with the requisite mental state. If you have a case that says that and lays out the particular facts that would be required to be shown,

rather than simply spelling out their evidence that they believe identifies, which you could challenge.

MR. DOLLAR: I think we go back to *Federated Radio* itself. They have to allege --

THE COURT: Okay. I got *Federated Radio*. I have heard you say *Federated Radio*. All right? And I read *Federated Radio*. And I have a whole team of people looking at *Federated Radio*. So, I am asking, is there some particular language in *Federated Radio* that lays out that factual analysis, that case from 1926, that lays it out?

MR. DOLLAR: I mean it is a short case. But it is one that lays out what the standard is that the people recognized, at least in 2012, is still the standard. And --

THE COURT: Counsel, it is easy to say what the standard is. What you are saying is that what they have done in their effort to meet that standard is inadequate because they have laid out specific factual references. And I am asking, show me a case where this was shown or determined to be inadequate, where someone laying out these specific factual references to establish the requisite mental state was said, no, all you did was just lay out evidence.

MR. DOLLAR: Your Honor, there are no facts

alleged in this complaint that show that Mr. Brown failed to conduct a reasonable investigation. The only -- the only attempt is this paragraph 141 that is just a rote recitation. They have to allege something. They have to allege something to create an inference that Mr. Brown did not undertake a reasonable investigation. And what I am saying is that it is not here. Yes, they have itemized communications. But with respect to those communications, they have not alleged --

THE COURT: Counsel, at a trial -- at a trial what would happen? How would this proceed? They would go in and they would offer up exhibits, or letters. No one knows what is in a human being's head. How can anyone do that other than by saying, well, these are the documents he got. Everyone, ladies and gentlemen of the jury, look at this and determine whether or not these documents would cause reasonable members of the jury to believe that what the executive -- their fellow executive said, was true. That's how it would be done. They have given you the roadmap of what they would have to lay out.

MR. DOLLAR: Your Honor, I think that if we went to trial and they put on no evidence whatsoever that Mr. Brown failed to undertake a reasonable investigation, which is what the legal standard is, I think the result would be a directed verdict. Especially given that we

have a Business Corporation Law 715(h) which says as a matter of law, as a matter of law it is reasonable to rely on.

THE COURT: In discovery, Counsel, they would present Mr. Brown with these itemized documents. And they would ask him under oath, what reasonable investigation did you take to determine whether these things -- whether you could rely upon these statements. And he would say either I did this X, Y, and Z; or he would say, I didn't do anything. And then that would be the basis for the parties going in and challenging. Simply sitting on his hands, if someone gives him something that other people might look at and say, that's suspect, that doesn't sound reasonable, that's a fantasy. And if you start pitching a fantasy to, you know, various members of the public, they might be sold. That's the whole nature of fraud or, you know, that's the issue.

MR. DOLLAR: I think, Your Honor, if the answer were, I got these documents from Aaron Fischman, I got these documents from Nebo Djurdjevic, I had no reason to believe that they were misleading me -- and again, there is no factual allegation that Steve Brown had reason to believe that they were misleading him -- that defeats a Martin Act claim. As a matter of law, that defeats a Martin Act claim.

THE COURT: That would defeat a Martin Act claim possibly at summary judgment where they would ask the questions, you would have the responses. And the Court would be presented with the sworn testimony with respect to each of these documents that have been identified in the complaint. And either it will sound or ring true or it wouldn't. And if it looked like the Court couldn't figure that out there is a basis for figuring that out as a matter of law, the Court would pass it on to a jury or other fact finder to hear the evidence at a trial and then make that determination. They wouldn't just -- the problem here is foreclosing inquiry without discovery. That's the problem.

MR. DOLLAR: Your Honor, they have to make the allegation. They have to make the concrete factual allegation as to --

THE COURT: Counsel, I have heard that. All you are doing is repeating that. I asked a question whether you could show me a case where a Court said when someone had laid out documents in a complaint, that that was inadequate. And all you do is tell me that the short, which you described, 1926, 100 years ago, case of *Federated* that that lays out the standard. I am asking for an analysis.

MR. DOLLAR: Your Honor, I am not aware of a

case, a Martin Act case.

THE COURT: That's all right. That's the answer. That's the answer. And I don't need to keep having you go back to saying, you know, they haven't met the standard even though they have laid out these facts. Because the standard is that they must do this. And I asked you if there is a case other than from 1926 where the Court has determined that based upon a pleadings failure to identify something, that they dismiss the case at this early stage.

MR. DOLLAR: I point again to the People's own representation in the Greenberg case before the Court of Appeals, which was 2012, just over a decade ago, understanding that this is the standard. And I think they recognized in the first motion to dismiss that they did not meet the standard, which is why they tried to reconstitute the standard as one for strict liability.

Now the question before us is, have they corrected that in the amended complaint. And they haven't. Because again, the only allegation of a failure to -- despite the fact that the communications are itemized, the only allegation of a failure by Mr. Brown to undergo a reasonable investigation is this conclusory statement in 141. So they heard the standard applied by Justice Sherwood and they came back and said, well instead

of following these strictures, these cautions that you have given us, we are going to put in this conclusory statement, Defendant Brown failed to conduct a reasonable investigation concerning the statements he was relating. And it ended with that.

This is a fraud case. This requires specific facts to be pleaded. And I understand that now they have broken down the communications in these sort of itemized line items, but again, there is no fact alleging Mr. Brown failed to undertake the reasonable investigation.

I would also like to turn to the materiality issue. That is another element of the Martin Act claim, as well as the Common Law claims. And that's simply not there either. Because when we look at these itemized communications broken down, and we have the full communications with respect to some of them, they included them as exhibits, I believe that the People are in possession of these documents in their entirety. These are forward-looking statements. These are forward-looking statements. 135(a): "In an August 15, 2013 letter Defendant Brown wrote: 'Cardis expects to be seeing revenues from the vending machine opportunity in its joint venture with Spindle as early as 2014.'"

And then we have, you know, we have more of these "forecasts," "expects," "anticipates." And in some

of these instances -- and materiality is an issue of law. It is not an issue of fact. We have to look at the statements that they have alleged here and say, are they the sort of statements that a reasonable investor would have used to make an investment decision. And remember, Steve Brown was not an officer of Cardis N.V., the entity that issued shares. This is an important distinction. This is a distinction that Justice Sherwood told the People to correct in their amended complaint. And they did not do so. That the reasonable investor must have -- it must be the sort of statement that would cause a reasonable investor to do something with an investment, buy shares, sell shares, what have you. And as a matter of law forward-looking statements with bespoke caution language are not material.

And so I would ask the Court to look at these statements individually which are in the complaint and look carefully and see what they are and what they are not. Which is that they are simply not material statements.

And then for the common law claims we have to take it one step further. They must actually have induced reliance. And again, the allegations of actual reliance are ones more cursory and rote. You have paragraph 140 listing some out. 140(a) is referring to a subordinate of

Defendant Brown making investments. But that's the same subordinate that is alleged several paragraphs earlier as being a participant in one of these misstatements.

You have a -- in 140(b), you have a -- excuse me 140 (a), you have a reference to Defendant Brown's representations that Cardis was on the cusp of earning substantial revenue, and realizing an IPO or buyout. Not in quotation marks. But then we refer back earlier in the complaint to 136(b) where it does directly quote from him, and there is nothing about "on the cusp." It says something very different. The exit -- and this is a direct quote, 136(b): "On January 22, 2014 Defendant Brown wrote the following:" -- direct quote, 'The exit strategy remains the same - an IPO or merger. Just becoming a major process in the music and mobile payment industry alone can give us a multiple billion-dollar valuation and is very achievable. We think we can become a major force in the industry by the end of 2014.'"

Nothing about "on the cusp." It is explaining what the strategy is, what the plan is, not a representation that this is immanently about to happen. Where does the "on the cusp" language come from? Well we look at paragraph 139(c), that refers to a different communication. "On October 27, 2014 Defendant Brown e-mailed the same investor stating, quote, 'it is my

responsibility to keep investors updated.'" And falsely claiming that Cardis was, quote, "on the cusp of signing and implementing several key groundbreaking agreements."

Not on the cusp of realizing an IPO. On the cusp of signing and implementing several key groundbreaking agreements.

I think it is important to go through -- I mean, they have done this, sort of, magic trick. They have said, well, we listed a bunch of communications, voila. We can state a claim. We have survived the motion to dismiss. We need to look at them granularly and see, are each of these material -- setting aside the mental state, which, again, is a barrier. Are the communications themselves material or are they forward-looking? Do they contain bespokes caution language? And the answer is they are not material. And they do contain forward-looking statements.

And then again for the Common Law fraud claim, actual scienter has to be alleged. And it is not. Actual knowledge of the falsity. There is no fact in here that other than the rote conclusory statement, nothing to raise the indicia that Mr. Brown knew that any of these statements were false. Or that he intended anyone to rely on the statements or beyond, again, the rote conclusory self-contradicting bits about reliance, specifically who

relied on them, how did they rely on them.

And finally, Your Honor, I just want to briefly address the statute of limitations issue that is in our briefs. In the time since this case was commenced the legislature enacted CPLR 213(9) which imposes a six-year statute of limitations on Martin Act claims and Executive Law 63(12) claims.

Since we filed our briefing papers, the First Department held in *People v Trump* 2023 NY App Div. Lexus 3448, that this statute should be applied retroactively. As far as I am aware, the Court of Appeals has not yet ruled on this. We believe that this decision was wrong. But we recognize that Your Honor is bound by the First Department's decision on this. We don't concede the argument. We want to preserve it in the event we ever go to the Court of Appeals. But recognize before Your Honor that you are bound by that First Department decision.

Aside from that, as noted in our briefs, there are aspects of the complaint that would not even survive the three -- excuse me, the six-year statute of limitations and should be rejected.

So in conclusion, Your Honor, for the reasons we have stated in our briefing papers and today on the record, all four claims against Mr. Brown should be dismissed for failure to state a cause of action. Thank

you.

THE COURT: Thank you.

MS. MCDONOUGH: Thank you, Your Honor. And good afternoon. May it please the Court?

On December 21, 2018 the Attorney General sued the defendants to stop their fraudulent practices in their dealings with investors that violated the Martin Act and Executive Law 63(12). The defendant's motion fails for three reasons:

First, the Martin Act and Executive Law 63(12) are adequately pled with materiality and falsity. Those are the only requirements that the law and the case law requires to be pled.

Second, the allegations pled in the complaint are pled with particularity because they state which defendant said what, when, to whom, and how it was said. Plus the complaint alleges materiality and falsity.

And lastly, as counsel just pointed out, the First Department has recently and decisively held that the six-year statute of limitations is retroactive.

Now, Your Honor, before I turn to my arguments, I, with the Court's permission, I wanted to briefly discuss some background and the facts, particularly the specific allegations against the defendant. It is my belief that that will help streamline and cut to the point

of the arguments.

So with that, Your Honor, the Martin Act and 100 years of case law beginning with the famous *Federated Radio* up to and including, for example, *Credit Suisse* in 2018, has said that the Martin Act is a broad remedial statute. The breadth of the Martin Act is consistent with its purpose, and that purpose is to protect the investors. And in *Federated Radio* the Court pointed out that the Act covers, quote, the acts need not originate from any evil design. And it is set out to, quote, defeat all unsubstantial and visionary schemes.

Now Your Honor, Cardis was a fraud. And the exact type of visionary scheme that the Court of Appeals contemplated when they decided *Federated Radio*. Cardis supposedly had some technology that would partner with various third-party merchants and enable those third-party merchants to bundle small-dollar transactions, thereby lowering their costs. The relationships with those third parties was necessary for Cardis to succeed.

So, year after year the defendants, including Defendant Brown, made promises that those deals with those third parties were evident. However, year after year none of those deals ever came to fruition. And they never came to fruition and that was even in the face of investors, for years, beginning in at least the summer of 2012,

questioning the defendants, including Defendant Brown, about whether Cardis was a fraud. Aaron Fischman ran Cardis and ran the scheme. Fischman is now a -- stands as a convicted felon, two felony counts, for his participation in Cardis. And he is also dismissed from this case.

But in order to carry out this scheme successfully, Fischman needed to work in concert with the defendants. Now, he had his financial expert, Defendant Stephen Brown; the lawyer, Defendant Lawrence Katz; the salesman, Defendant Steven Hoffman; and his right-hand, Defendant Seth Rosenblatt.

Your Honor, first I am going to now, with the Court's permission, talk about all the defendants, but I am going to start with Brown.

Brown used various titles: CFO, Senior Financial Executive, VP of Finance, in conjunction with his favorable reputation in the community for his professional work and his charitable work, to create legitimacy for Cardis; to create the idea of profitability for Cardis; and to entice investors. One of Brown's jobs was to draft these investor letters. Now, the investor letters touted immanent deals, not forward-looking deals, immanent deals with various companies. The statements contained in these letters as detailed in the complaint

amounted to material misrepresentations because the deals were not immanent. There were also fraudulent practices because -- and I am referring to GBL 352-c(1)(b): They were representations as to the future which are beyond reasonable expectation or unwarranted by existing circumstance.

Your Honor, just to illustrate, I am not going to go through each paragraph in the complaint, but for illustration we allege in paragraphs 56 through 57 and 133(c) that in a May 25, 2014 letter, Brown made the material misrepresentations about three different music companies, those were Sony, Warner and Universal, stating that Cardis was going to close on deals within 30 to 60 days. That was an unwarranted promise, misstatement, based on the existing fact. And the existing fact at that time was that there have not been beyond one preliminary meeting with those companies.

Again to illustrate, we allege in paragraphs 53 through 55 that -- and 133(d), as in dog, that in a December 25, 2014 letter Brown wrote about a deal that was going to close in the next month or two, January, February of the following year, with RocNation. That was an unreasonable statement based on the existing fact. And that existing fact was that at the time Cardis did not have the necessary technology to make the RocNation deal

happen.

And again, in paragraphs 69 through 72 and 136(g), as in girl, Brown wrote in an e-mail to an investor this time, September 6, 2016, where he talked about two immanent deals, one was with a parking meter company based out of Cedarhurst, Long Island, where Cardis was -- where the offices of Cardis was. And that was, again, it was going to be an immanent deal. That was unwarranted based on the existing circumstance that at the time Cedarhurst, the town, had not approved Cardis working with this parking meter company. And there was a compliance issue. Cardis needed to pass some type of compliance that allowed credit cards to -- safeguard credit card transactions. Cardis did not have that necessary compliance.

That September 6, 2016 e-mail also included the material misstatement that there was an immanent deal with Cumberland Farms. That was unwarranted based on the existing circumstance that at the time there had not been a meeting between Cardis and Cumberland Farms. One single meeting happened several months later.

Now, Your Honor, to put these -- these statements in context, and as I stated before, beginning in the summer of 2012 Brown and some of the other defendants were on notice that Cardis was potentially a

fraud. So in paragraph 139(a) there an investor questioned what had been spent to get Cardis off the ground and questioned whether Cardis was a scheme.

Then again in July 2014 Brown was part of the employees that put together a response from an investor. That investor e-mailed the defendants and said, and this is at paragraph 118, 119 and 139(b), you guys have been telling the investors you are very close to a deal for many years now, and they no longer believe you. And the investor asked if they were involved in a real fraud. Part of Brown's response included that he called the allegations of fraud, quote, "absurd on every level."

And Your Honor, with the Court's permission, I wanted to talk about the other defendants now, if that's all right.

THE COURT: Let me hear from them first.

MS. MCDONOUGH: All right. In that case, Your Honor, I'll now turn to my first claim.

The complaint states a claim that Brown violated the Martin Act. The Martin Act, enacted in 1923, *Federated Radio*, 1926, and 100 years of case law lays out exactly what the Attorney General is required to plead. And that's materiality and falsity.

And just a quick point, Courts have routinely held that the elements required for Executive Law 63(12)

are the same, in addition to it being repeated and persistent.

And that's what we pled here. The statements made to investors, as I have discussed briefly and that are laid out in our brief and laid out in our complaint, most importantly, is that they are false. They were based on unwarranted -- they were unwarranted based on the existing facts at the time, the existing circumstances. And they were material. As I said, Cardis' success was contingent upon these third-party -- these third-party deals. The fact that an investor heard that a third-party deals was imminent, within 30 to 60 days, in the next month or two, that bears on materiality. That bears on a reasonable investor's decision as to whether to invest.

Brown attempts to add an additional element that the People are required to plead for a Martin Act claim. That is not what is required by the law. It is not required by case law. And it is not what *Federated Radio* said. *Federated Radio* said that in that case the materials included in their prospectus, included material from an anonymous source. In that case the promoter was required to do a reasonable investigation. That doesn't mean that that now created a new element. And again, there is no case law that requires that up to and including, like you said, *Credit Suisse* in 2018.

Materiality and falsity is all that is required.

Regardless, Brown participated in the fraud. He was necessary, he provided comfort to investors. He was put on notice beginning at least until -- in 2012 from investors themselves that Cardis was a fraud. There was no reasonable investigation. If he had done a reasonable investigation, the scheme would have been found out.

Brown also asserts, I guess, an affirmative defense to a Martin Act claim relying under Business Corporation Law 715(h) that he relied on the statement of Fischman and his other co-conspirators. This is a defense, it is not appropriate for a motion to dismiss.

First, it is not a defense that is listed or contemplated under the CPLR as an affirmative defense such as a statute of limitations. It is a factual determination.

Further, the Business Law does not exculpate defendants from participation in fraud, especially years-long fraud.

Additionally, the 715(h) is a potential defense for an officer. At no point have the People alleged in their complaint that Brown was an officer. In fact, we allege the opposite. We allege that he used various titles to create the appearance that he was the financial expert, and therefore investors should be able to have

comfort in providing their investments. And the fact that he is not an officer is -- it has also been conceded by Mr. Brown.

Regardless, if Brown would like to use that as a defense, the appropriate time to attempt to do that is after the fact finding has occurred.

And as Your Honor had pointed out, part of that fact finding will include, and I just wanted to quote from the statute itself, "whether an officer shall perform his duties as an officer in good faith and with the degree of care which an ordinary person in a like position would use under similar circumstances." And that would also be with the understanding that in relying on good faith, in so relying he shall be acting in good faith and with such degree of care, but he shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

We have alleged, as I said, and I don't want to belabor the point. At least since 2012 Brown had notice. At the time of fact finding that's when the issue of whether reliance was reasonable or in good faith can happen. Now at the motion to dismiss stage, we are not there. As the Court pointed out, that is the meat of discovery.

Now turning to my second point. The complaint is pled with particularity. As the Court noted, the purpose of any pleading requirements is to make sure that the defendants are on notice of what the allegations are. The complaint contains allegations which defendant, including what Brown said, the date he said it, how it was said, and to whom. And includes what was said in quotes. And again, each of those statements are material and false and they have been pled accordingly.

Now, Your Honor, I don't want to belabor the point, the First Department, this is my last point, the First Department has decisively held that the six-year statute of limitations is retroactive. I do have copies of recent cases, the *People v Allen* and *People v Cohen*, if the Court would like; and I have copies for counsel.

Would the Court like those?

THE COURT: I don't need it. Thank you.

MS. MCDONOUGH: Okay. Your Honor, at this point I have concluded my prepared remarks and I am happy to answer any questions the Court has.

THE COURT: Briefly, Counsel, and then we will break for lunch.

MR. DOLLAR: Yes, Your Honor. If I may just raise a few points in rebuttal. First, regarding the duty of reasonable investigation, the A.G.'s office represented

to the New York Court of Appeals in 2012 that this was the standard in a Martin Act case. Page 106 of their brief in Greenberg. The Martin Act imposes a duty of reasonable investigation. In a prior proceeding in this case Justice Sherwood concluded that the Martin Act imposes a duty of reasonable investigation. That is the legal standard here.

In terms of BCL 715(h), we did not interpose this as an affirmative defense, we brought it in to illustrate the fact that what they have alleged, the facts that they have alleged as a matter of law do not demonstrate that Mr. Brown failed to undertake a reasonable --

THE COURT: How can it be as a matter of law if they haven't affirmatively pleaded? If something is an affirmative defense that means you have the burden to show it.

MR. DOLLAR: It is --

THE COURT: You have the burden to show it.

MR. DOLLAR: It is not an affirmative defense, that's exactly my point. It is an element of their Martin Act claim to show a failure to have undertaken a reasonable investigation. They conceded this before the Court of Appeals in 2012. It is simply a litigation construction for their original opposition to our first

motion to dismiss that they came up with, that Justice Sherwood rejected.

THE COURT: Where in the Martin Act, what language in the Martin Act says that they have this requirement?

MR. DOLLAR: It is *Federated Radio* interpreting it. And it is the People adopting that interpretation before the Court of Appeals. They have said in -- they represented to the highest Court in this state, the Martin Act imposes a duty of reasonable investigation, quoting *Federated Radio*.

THE COURT: Under certain circumstances, sure. Under certain circumstances sure. I mean, they laid out that in the factual circumstances *Federated* was different from the factual circumstances here.

MR. DOLLAR: They have conceded and Justice Sherwood has held --

THE COURT: I got that counsel. Rebuttal is adding something new.

MR. DOLLAR: Finally, I would ask that Your Honor please read the allegations against Mr. Brown carefully and take particular note of what is a direct quote and what is not direct quote, because my adversary misstated the complaint a number of times.

First of all, she disregarded paragraph 19 of

the complaint, which alleges Defendant Stephen Brown was, at relevant times, the most senior financial executive at Cardis and was variously described as its Chief Financial Officer, Vice President of Finance and/or Senior Financial Executive. And then with regard to --

THE COURT: Counsel, I ask you this question. Can you, in good faith, tell me, as an attorney, licensed to practice in law, that your client has told -- well, we won't talk about what he has told you, but that you have a basis for saying that your client -- that the books and records of one of these Cardis entities shows your client to be a listed officer of that company.

MR. DOLLAR: Of Cardis U.S.A. but not the entity that issues shares. And I think this is important and it is important that they -- that the People were told to correct this deficiency in the complaint, stop saying Cardis. It matters which Cardis was which.

THE COURT: Counsel, it may or may not matter which is which. There are various organizations, prominent organizations, that have a multitude of small, separate, legally separate corporations, who all act together in concert and who have been accused of jointly committing fraud.

We will break for lunch here.

(Whereupon, a luncheon recess was taken at this

time.)

* * *

A F T E R N O O N S E S S I O N

* * *

COURT OFFICER: All rise. Part 43 is back in session, the Honorable Robert Reed presiding.

Come to order. Be seated.

THE COURT: Before we go on to the next motion, I just want to make sure I have this down on the record.

Chambers was notified by e-mail on August 3, 2023, that the defendant, Choshen Israel LLC, filed a notice of bankruptcy in the U.S. Bankruptcy Court on August 2, 2023 at 10:00 p.m. The case number N23-35636.

It is well settled when an entity files for Chapter 11 bankruptcy any litigation is stayed with respect to that entity. That's the 11 U.S. Code section 362(a).

Choshen is named as a defendant in an action pending before this Court in the matter that we are here on today, *People of the State of New York by Letitia James, Attorney General of the State of New York v Aaron Fischman, et. al.* index number of 452353 of 2018. Oral arguments on this matter had long been scheduled for August 3, 2023. Although Choshen did not file any motions to be heard on the docket today, the case nonetheless is

stayed with respect to that entity pursuant to U.S. Code Section 362(a).

However, there are four motions to dismiss scheduled to be heard today before this Court. Those motions are advanced by defendants Brown, Hoffman, Zerp, Katz and Rosenblatt. Just to be clear, the Court is not entertaining any application to stay this action as to any of the moving defendants. It is well settled that the automatic stay provisions of the Federal Bankruptcy Laws do not extend to non bankrupt co-defendants. See *Maynard v George A. Fuller Company* 236 A.D.2d, 300. See also *Goldman v Moskowitz* 192 -- excuse me 194 A.D.2d, 385. And *Centrust Services v Guterman* 160 A.D.2d, 416. Also see 11 USC Section 362(a)(1). While under certain circumstances an automatic stay may be extended for non debtors, see for example *Teachers Insurance and Annuity Association of America v Butler* 803 F.2d, 61. *Thomson and Kernaghan and Company v Global Intellicom Inc.*, 2000 Westlaw 640653 and 11 USC Section 105(a).

The record here is devoid of any evidence that such circumstances are present. For example, in *Teachers Insurance* the Court offered a non-exhaustive list of factors indicating where a discretionary extension of a stay may be appropriate. Those factors include judicial economy, interest of justice, good faith filing and formal

petition asking for an extension of stay. And whether the extension of a stay to co-defendants would contribute to the debtor's effort to achieve rehabilitation.

None of those circumstances are seen present here. Further delays would in effect -- would in fact result in judicial inefficiency.

Second, the interest of justice is not furthered by entry of any stays. That stay would only further delay a ruling on the merits of this 2018 case.

Third, co-defendants have not formally moved to extend the stay.

And finally co-defendants have not indicated a stay would contribute to the debtor's efforts to achieve rehabilitation.

Therefore, the action at this point is going to proceed against Choshen's co-defendants, see *United Airlines Inc v Ogden New York Services, Inc*. 305 AD2d, 239.

Let's hear the next motion up.

MR. DOLLAR: Are we finished, Your Honor, motion 11?

THE COURT: I expect to rule today.

MR. BIENENFELD: Your Honor, my name is Saul Bienenfeld and I have the pleasure of representing Mr. Hoffman, Mr. Rosenblatt and Zerp. I will be very brief.

First, of course I incorporate all of the arguments Mr. Dollar presented on behalf Mr. Brown. I believe it is relevant to all of the co-defendants here.

I am really at a loss Judge because everyone is talking about an amended complaint. And I don't have an amended complaint. I was never served with an amended complaint. I don't see one on ECF. So I don't know what anyone is talking about in terms of amended complaint. There is an exhibit that was a proposed amended complaint. But it is an exhibit. It is unsigned. And it doesn't -- it doesn't follow the format of what this Court wants.

THE COURT: What are you moving to dismiss against? You filed a motion to dismiss.

MR. BIENENFELD: I renounced it also, Judge.

THE COURT: What is everyone moving to dismiss against? What are they moving to dismiss? I don't know.

MR. BIENENFELD: I don't know either. There is no amended complaint that has been served upon me.

THE COURT: Why isn't the motion moot? If I deny the motion as moot, if there was no amended complaint then there is nothing for me to do here. I have been called by four sets of defendants to move to dismiss an amended complaint. The plaintiffs didn't ask me here. I am here because four separate sets of defendants said they wanted to move to dismiss an amended complaint.

MR. BIENENFELD: I guess they are trying to move the proposed amended complaint. If they want to file it, then you would dismiss it retroactive. I guess that's what people are looking for, because there is nothing filed that says amended complaint.

THE COURT: Counsel, I ask you to listen to yourself for a moment. You are standing up at oral argument saying that you have filed with the Court a motion -- you, as an officer of the court, have filed with this Court a motion to dismiss an amended complaint that doesn't exist.

MR. BIENENFELD: Yes. I could argue in the alternative. I am allowed to do that as a defendant. And in the alternative there is no amended complaint. If you think there is one, then I can argue why it should be dismissed. But I think there is nothing.

THE COURT: Counsel, you brought the motion. That part is the problem. You brought a motion. We could be moving ahead just dealing with discovery. But I am here because you, among four other counsel, brought a motion seeking judicial action to dismiss an amended complaint. If there is no amended complaint, Counsel, if there is no amended complaint, then you have filed a frivolous motion and you ought to be sanctioned.

Because I don't -- they didn't bring this. You

brought it. You said in good faith that there was an amended complaint that needed to be dismissed. That's why I am here.

MR. BIENENFELD: Your Honor, I think the proof that the People have not met their burden in this proposed amended complaint is the fact that no criminal charges were brought against any of the clients here except for Fischman. It is same office that brought the criminal charges against Fischman. If you look at the Martin Act, you will see that there is the same level of culpability civilly as well as criminally. And since they didn't bring any criminal charges against Hoffman, Rosenblatt, Katz, Zerp, Brown, then they obviously didn't think there is enough elements to bring it criminally. And there are not enough elements to bring it civilly either.

Thank you, Judge.

THE COURT: All right. Counsel?

MS. MCDONOUGH: Thank you, Your Honor.

The complaint is pled with materiality and falsity, which are required for Martin Act claims at 63(12). I am not going to repeat the same arguments, unless Your Honor has any questions.

As I did earlier with Defendant Brown, the complaint is pled particularly with respect to Defendant Hoffman. That includes dates, statements, particularly

there is an allegation that on August 29 to 30, 2016 he communicated with investors saying: 100 percent you should invest more in Cardis because of the pending deals with the Long Island Parking Meter Company and Cumberland Farms. As I stated before, those were material statements that were false based on the circumstances -- the existing circumstances at the time.

With respect to counsel's last argument about not filing criminal proceedings, none of that was briefed, so I am not -- I can brief the Court or we can brief the Court later if the Court would like a response to that. But just generally, there are different standards in civil and in criminal practice, including but not limited to the need to plead intent beyond a reasonable doubt that do not exist in the civil Martin Act or a 63(12) claim.

THE COURT: What's your take on where we are just as a matter of substance? Motion sequence nine is a motion for leave to amend. It was granted? It was granted?

MS. MCDONOUGH: Yes, Your Honor.

THE COURT: So there has been an amended complaint?

MS. MCDONOUGH: Yes, absolutely, Your Honor.

THE COURT: Anything else?

MR. BIENENFELD: The only amended complaint on

ECF is an unsigned exhibit. That's all I want to say.

THE COURT: Motion sequence 13.

MS. KATZ: Good afternoon, Your Honor.

I am Lawrence Katz, the defendant. I am represented by Barry Feerst in the other Katz entities.

THE COURT: What is that?

MS. KATZ: The other Katz entities, sued as Katz PLLC and Katz P.C.

THE COURT: They are represented by whom?

MS. KATZ: They are represented by Barry Feerst. Mr. Feerst has a chronic condition that did not permit him to physically be here today, so I have elected to argue the motion on my own.

THE COURT: You can argue the motion for yourself, sir. I am not taking argument on the Katz entities other than yourself.

MS. KATZ: Judge, there isn't much difference, and I am an attorney duly admitted, so I believe I can represent both of those entities as well.

THE COURT: All right. Go ahead.

Be reminded that everything you say here, I am looking at some of the allegations against you, and I just want to, you know, you need to be advised and reminded that this is a record. And whatever is on the record may be, to the extent it relates to any actions by you as an

attorney that relate to conduct that could be problematic before a disciplinary committee, it is all being taken down, certified by a court reporter. So just take care.

MS. KATZ: I appreciate that, Judge. Thank you.

Your Honor, I point the Court to the allegations contained in the amended complaint, paragraph 164. The allegations here are that defendants essentially took money that belonged to the Cardis entity. But if you look carefully at the allegations, they indicate transfers of money made from one IOLA account to another. And until the end of the allegation, you don't see any transfer being made to a Katz entity.

But, even within the allegation itself, it is stated, without specificity. For starters, it is not even stated that the original monies, so for example in paragraph 164 they say: "Defendant Katz transferred $40,000 from the Katz IOLA account contained at Bank of America into a JP Morgan Chase account in the name of Law Offices of Lawrence Katz, IOLA trust account. It doesn't truly state where the $40,000 came from. And by the time you get to the end, there is no specific indication, since it says over the month Defendant Katz spent or withdrew $2,624.19 from the 0306 account, all which appear to be for personal expenses. But it doesn't tell us what was in the account before monies were deposited into that

account. So those monies that they finally get to the end, and it is $2,600, or roughly $2,600, we don't even know if that $2,600 was originally some money that was somehow related to Cardis or belonged to Cardis. And they failed to do it in each one of these allegations.

And even more than that, it is impossible for the Defendants Katz to even know what the claim is. Because while four examples come to something like $20,000, it is impossible to know, in light of the allegations, that supposedly $72 million was taken. Exactly what are the specific claims that the Katz defendants, if you will, took? Because essentially the allegations against Katz are one of conversion.

And so in truth, they should be specifying both the source of funds, and not in a conclusory fashion. I paid attention to the argument with Defendant Brown. But it is not a specific allegation to say the money belonged to Cardis. It is a specific allegation to say the money came from, by way of example, Robert Schwartz for an investment in Cardis. That would be specific. It is a conclusion to say that the money belonged to Cardis. It is not the same thing. And they should be doing that for each and every one of the claims that they are making against the Katz Defendants.

The defendant is entitled in this type of case

to specific allegations. And as much as Judge Sherwood had pointed out, I don't know if he pointed out specifically this case, but he has pointed out in other cases, when one is dealing with a Martin Act case, the AG has already conducted discovery. The AG has these bank records. So why aren't they telling us what happened with the account? They know it. They can do it specifically. There is no reason for the Court to be concerned that plaintiffs are not getting a chance for discovery. The plaintiffs here have failed purposefully to specify what has happened. And instead, they are much happier making general allegations, which I also pointed out in the papers, which seemingly claim that the Katz Defendants took two and a half million dollars.

But that doesn't seem to be what they are saying now, and I believe motion to dismiss is appropriate. This is the second complaint that we are dealing with. And the first complaint they were told be specific. Over here, against the Katz Defendants, they purposely left out any other allegations in regard to money that was supposedly taken by the Katz Defendants. They are not even bothering to give us that. And the ones that they do give it to us, they are purposely being evasive. Where are the -- where is the missing information? What is it that they are not telling us?

So again, I would move to dismiss based on the fact that these allegations are not adequate for this type of complaint.

And Judge, I would also on the statute of limitations, we pointed out that, again, because of the nature of the allegations against the Katz Defendants, there is a three-year statute of limitation. And while the AG has pointed out that there is an amendment to the statute, there is some case law favorable to the position of the AG, the amended deals only with those instances where one is bringing a statutory case, and so the SOL was ruled to be three years. And now they have -- the State Legislature has, I guess the AG would certainly use the word, "corrected" it to reflect that it is six years. But the statute does not change that which existed before where, in fact, there was a common law type of action that related to the statute. And the proof of that is that the amend says six years. And it makes no exception for fraud. Martin Act deals with fraud-like circumstances. One would have expected that if they were changing it, they would have maintained at least the fraud statute starting from the date when it is that it is discovered and put in. Again, the differences with fraud that it is six years or two years from the date when the fraud was discovered, and the statute only says six years.

So either the AG is going to take the position that fraud -- common law fraud statute does not apply to the Martin Act, which I doubt that they are taking that position. So they must be taking the position that, just as we do, that for the purposes of those cases where there was a statute, a common law that applied, that is the case, despite the amendment of the statute.

I have nothing further, Judge. If you have any questions I am happy to answer.

THE COURT: Go ahead, Counsel.

MS. MCDONOUGH: Thank you, Your Honor.

Defendant Katz, like Defendant Brown, provided investors with a level of comfort. Their investment money was directed into the Katz IOLA accounts. That is the money that we alleged in the complaint moved to Fischman, $3 million, moved to Fischman's family, his wife, his daughter, et cetera.

And in paragraph 164 we also allege that that money was moved to Katz for personal -- personal expenditures that include groceries and shopping items.

Your Honor, the complaint, again, is pled for material -- excuse me, for the Martin Act where those investors' funds that were deposited into the IOLA account were -- I am quoting from GBL 352-c(2) -- were obtained or subject to the Martin Act because they were obtained by

means of false pretense, representation and promise. That is a violation of the Martin Act. And we have pled that, as I already stated.

It is pled with particularity. The transfers, the amounts, the transfer dates, the amounts of those transfers, to which account all of those details are pled in the complaint.

And Your Honor, the statute of limitations issue has been decided by the First Department. And the Martin Act in 63(12) have a six-year statute of limitations and it is retroactive.

Your Honor, do you have any questions with respect to this defendant?

THE COURT: No. Thank you.

Anything, Counsel?

MS. KATZ: Your Honor, I would just point out that the comment by the AG that people were given a level of comfort is also simply pled in generalities. It is not based on anything. It is a theory that they have. But, this is about a factual case.

THE COURT: The theory that they have is that the money was -- the theory they have and the allegation that they make is that monies were put into an attorney's IOLA trust account. And an attorney's IOLA trust account would only be used for the purposes of those clients. It

is not to be used for another purpose. It is not to be sent to a third party who is not one of those clients. And it is not to be used for personal expenditures. Those are the allegations they are making. So, that's -- that's what they say.

MS. KATZ: But Judge, what Your Honor --

THE COURT: And that --

MS. KATZ: Yes?

THE COURT: And the theory -- the allegations that they make is that those things took place. And the theory is that an attorney's trust account is one that is required by law, and that what is understood by the placement of funds into an attorney's trust account is that those funds simply are not going to be used for any purpose other than the client's benefit. And if they are, then there is a misuse. And there is a representation that is made simply by setting up that bank account, a trust account, and in viewing it with that sense of integrity. That's the argument.

MS. KATZ: As I said, the way the Court has phrased it, the AG should have made allegations regarding every one of these transfers. And if that's what they are doing, it should be in the complaint. And if they are seeking funds just for these four transfers, then I understand why I see these four. But as I said, they are

also not pled properly, because you don't even know what monies ended up in the accounts.

So again, I understand that there is a theory. But there is nothing here factually that shows what happened with any of these investors other than to say that money was deposited in an IOLA account. And it seems to me that, again, there are ways to show what happened. So, for example, if we had someone buying a home and they had a check and it was made out for a certain purpose, we would know. But it is not here. And just to assume and go forward, I don't understand why it is that they can't plead this the way they are supposed to plead it. As Judge Sherwood said, these complaints have to be pled specifically.

Thank you, Judge.

THE COURT: All right. Who is next? I have motion sequence 13.

MR. BIENENFELD: I think it would be 15, but I have made that argument.

THE COURT: You have made the argument here.

Nothing else?

MS. MCDONOUGH: I don't have anything with respect to -- with respect to Defendant Rosenblatt to add, Your Honor.

THE COURT: All right. I have heard from

counsel for the parties on a variety of motions today. Some, I guess one case, we are essentially taking the matter without additional argument because of the -- without additional argument by identified counsel. But, with Mr. Katz's representations that the arguments that he made serve as well for those co-defendants whose counsel is not here.

The Court will now rule.

The Cardis enterprise is a Long Island based startup that raised tens of millions of dollars claiming they have developed revolutionary technology to lower the cost of credit card transactions. But according to plaintiff, the Attorney General, Cardis was essentially a Ponzi scheme. The Attorney General says no technology was ever developed; Cardis had no contracts or contacts that it represented to have to its investors. And its promises that an IPO was on the horizon were allegedly just another strategy to induce investors to continue pouring money into an enterprise that defendants knew was going nowhere.

In addition, the AG alleges that defendants used investors' money to distribute millions of dollars to Cardis' officers, owners, lawyers, family members and preferred charities, and that such payments were not authorized by any agreement.

In the amended complaint the Plaintiff, Attorney

General, asserts eight causes of action, including for scheme or artifice to defraud pursuant to GBL 352-a and 352-c; the first and second cause of action, repeated and persistent fraud and illegality as violations of the Executive Law, section 63(12), or the so-called Martin Act violations. See the third and fourth causes of action. Actual fraud which is alleged in the fifth and seventh causes of action and equitable fraud in the sixth and eighth causes of action.

Today this Court will address four separate motions to dismiss plaintiff's amended complaint. The motion sequence 11 is advanced by Defendant Brown, who it is alleged was Cardis' Senior Financial Executive and Vice President of Finance.

Motion sequence 12 is advanced by two defendants, Hoffman, an agent of Cardis BV, authorized by that company to offer and sell its securities to the public; and Zerp, LLC, which is a LLC formed by Defendant Hoffman which received payments on Hoffman's behalf.

And motion sequence 13 is advanced by Defendant Lawrence Katz, Cardis' attorney, who maintained interest on lawyer account, IOLA bank accounts, for the benefit of Defendants Cardis.

Motion sequence 15 has been advanced by Defendant Rosenblatt, who is a director of Cardis and a

director of Choshen, an entity which held and distributed most of the investors' money.

The Court will consider each of these motions separately. Since each of the four motions have some overlapping arguments, more specifically since each of the four defendants argued that the statutory period has run out as against each one of them, the Court will first consider this argument.

The analysis and the conclusion of the statutory period has not run out applied universally to each of the four defendants, in this case four sets of defendants. The defendants herein assert that all claims are subject to a three-year statute of limitations and are thus time barred. This argument is rejected by the Court.

First, with respect to each of the defendants, the amended complaint plainly alleges conduct within three years of the filing of the original complaint in December of 2018. With respect to each one of them, it alleges conduct as recently as the spring of 2016. Therefore, even if the three-year statute of limitations were to apply, the claims would be timely.

The amended complaint, however, also alleges some wrongdoing that dates back as far as 2011, for example, but earlier conduct is also actionable under the continuing wrong or continuing violation theory, because

it was part of a single allegedly fraudulent scheme to defraud Cardis investors.

Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act. See *Palmeri v Willkie Farr and Gallagher LLP*, 69 NY Supp. 3d, 267 at 271. The doctrine is also known -- the doctrine also known as the continuing violation doctrine, applies to a variety of types of cases, including breach of contract, breach of fiduciary duty, and statutory violations. See *People v Trump* 88 NY Supp. 3d, 830 at 837. It has been found to be applicable to fraud claims under GBL Section 349 Donnelly Act antitrust claims and violations of non-profit statutes. See *Shelton v Elite Modeling Agency* or *Elite Model Management Inc*. 812 NY Supp.2d, 745 at 757-758. Here, the amended complaint alleges a single fraudulent scheme and a series of continuing fraudulent acts in support of that scheme from 2011 to 2018. Because the complaint alleges a series of continuing wrongs the statute of limitations was tolled until the last wrongful act alleged in 2018. See *Trump* at 88 NY Supp.3d at 837-838, where the Court found that continuous and pervasive acts represented continuing wrong. For this reason the amended complaint is timely.

Now the Court will address the remaining

arguments as advanced by each separate defendant.

The motion sequence number 11 Defendant Brown moves to dismiss the amended complaint arguing that it is insufficiently particular. It fails to make allegations of materiality, violates the statute of limitations and that Brown's actions cannot fall under the Martin Acts purview because he relied on other executives in compliance with the Business Corporations Law. In motion sequence 12, Hoffman and Zerp join in Brown's arguments without delineating how their case differs. Accordingly, the Court shall address motion sequence 11's arguments and rule on both motion sequence 11 and motion sequence 12.

Brown first argues that the complaint fails to allege facts sufficient to show Brown's violation of the Martin Act. The Martin Act empowers the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York. The Martin Act does not require scienter, intent to defraud or justifiable reliance. See *People v Greenberg* 946 NY Supp.2d 1 at page eight. Instead, the Martin Act imposes a duty of reasonable investigation, per *People v Federated Radio Corp*. 244 NY 33 at 41, 1926 case.

While the complaint alleges that Brown drafted and sent out investor letters, the complaint does not

allege Brown's knowledge of any falsity. Indeed, Brown relied upon information obtained from other corporate officers from Cardis as permitted under BCL Section 715(h). BCL 715(h) indicates that in performing its duties an officer shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by one or more officers or employees of the corporation whom the officer believes to be reliable and competent in the matters presented. Or, counsel, public accountants or other persons as to matters which the officer believes to be within such person's professional or expert competence, so long as in so relying, he shall be acting in good faith and with such degree of care. But he should not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

In contrast, the individual accused of Martin Act violations in *Federated Radio* who relied upon unnamed third-party sources, Brown relied upon statements of corporate officers. Accordingly, Brown argues that he met the reasonable investigation standard where information was presented to him by corporate fiduciaries with personal knowledge of the transactions in question.

Plaintiff argues that the Appellate Division previously rejected the argument that Business Corporation Law Section 715(h) permits a defendant to escape liability under the Act because the allegedly false information came from a person on whom he justifiably relied.

The Court indicated that such arguments cannot meet the standard for dismissal pursuant to CPLR 3211(a)(7). And accordingly, the law of the case bars such arguments.

Additionally, the BCL requires a fact intensive inquiry. The plaintiff is permitted to rely on officers and employees believed to be reliable and competent, provided that the officer is acting in good faith and with such degree of care.

The amended complaint challenges the reliability and competence of parties' executives, and Brown's faith in relying upon their statements, given Cardis' myriad abuses of the corporate forum. Brown's failure to investigate and his reckless or intentional dissemination of misinformation.

Defendant challenges plaintiff's invocation of the law of the case, as Brown was a non-party at the time of Hoffman's cross motions at issue, and this could not constitute the same party raising the same proof in successive motions. Nevertheless, their reliability in

good faith elements of the BCL are fact intensive questions, not ripe for dismissal on a motion to dismiss.

Plaintiff contests defendant's characterization of *Federated Radio*. Per plaintiff, the Appellate Court rejected arguments by stockholders that intentional misstatements were required to sustain Martin Act allegations, finding instead that material misrepresentations were enough. The Appellate Court further explained that promotors or disseminators of information have a duty of reasonable investigation and are responsible for any materially false statements that they failed to uncover and proceed to disseminate.

Notably, *Federated Radio* on the plaintiff's interpretation, stands for the proposition that lack of scienter will not relieve liability in Martin Act claims. It does not mean that reasonable investigation excuses or preempts any liability for the dissemination of false information.

Next plaintiff argues that the facts do not indicate that Brown conducted a reasonable investigation. The amended complaint alleges that Cardis was a tightly controlled organization, led by a small group of individuals, including Brown, who was personally involved in repeated misrepresentations over a sustained period of time and doubled down on denials of any wrongdoing. The

amended complaint alleges that Brown never obtained any materials that were corroborated as representations and that he failed to conduct a reasonable investigation into the statements he relayed.

Such fact intensive inquiry is not appropriate on a motion to dismiss, and accordingly, I will not address these arguments at this stage. That's for a later date.

Brown argues that the motion should be dismissed because the alleged false representations were not material. Brown points to a recent decision by Justice Ostrager, of this Commercial Division, finding that materiality in an investor fraud context requires examining whether the alleged false representation was one on which a reasonable investor would make investment decisions. See *People v Exxon Mobile Corporation*, 65 Misc 3d, 1233(A). Also 2019 Westlaw 6795771, 2019; and the NY Slip Op 51990(U).

Brown submits that the reasonable investor is not one who would make investment decisions based on tentative, speculative or otherwise forward-looking statements under the, quote, "bespeaks caution" doctrine. See *People v Merkin* 2010 NY Misc. Lexis 523 at *13-14.

Brown argues that the complaint references that Brown communicated Cardis' future-looking expectations

about entering into agreements with RocNation increasing opportunities and potential buyouts on mergers. Under this view, Brown merely provided lay opinions about the merits of lawsuits. Moreover, Brown submits that the complaint fails to indicate how the statements affected investment decisions, as they were made to preexisting investors.

Plaintiff by contrast, points to the complaint's detailed description of Brown's involvement in the preparation and dissemination of fraudulent financial projections. Estimating over $1 billion in revenue by 2023. Moreover, plaintiff argues that whether information proffered to investors is mere opinion or puffery is a fact-intensive inquiry. See *People v Bank of New York Mellon Corp*. 977 NY Supp.2d, 668.

As such, this Court declines to dismiss the complaint on this basis.

Brown next argues that the complaint fails to allege facts sufficient to show that he violated Executive Law Section 63(12). Executive Law Section 63(12) permits the Attorney General to bring an action whenever any person shall engage in repeated fraudulent or illegal acts, or otherwise demonstrates persistent fraud or illegality in the carrying on, conducting or transaction of business. Executive Law Section 63(12) utilizes the

same definition of fraud as the Martin Act, wherein scienter and justifiable reliance are not required. Brown alleges that the complaint is insufficiently particularized with respect to Executive Law 63(12), allegations, as with the Martin Act allegations, in that they fail to allege with particularity what repeated fraudulent or illegal acts Brown committed. The complaint refers to communications with investors, but alleges no facts suggesting that the acts were repeated or persistent. Instead, it concludingly alleges a pattern. Defendant is incorrect on this point.

The amended complaint details Brown's involvement in ongoing and persistent fraud. Brown argues that the complaint fails to plead elements necessary to sustain allegations of actual fraud. Prima facie elements of a claim for actual fraud under New York Law are:

One, a material misrepresentation of fact. Two, knowledge of the defendant of its falsity. Three, intent to induce reliance. Four, justifiable reliance. And five, damages. See *People v Credit Suisse Securities (USA) LLC* at 31 NY3d, 622.

Brown argues that none of the allegations create an inference that Brown knew of the falsity of his representations or the materiality of his representations. Instead, the complaint alleges that many investors relying

upon Brown's good representation in the community made additional investments in Cardis based on his investor letters updates. Again, defendant is incorrect.

The complaint, to this Court's reading, details Brown's involvement in ongoing and persistent fraud.

Brown further argues that the complaint fails to plead the elements necessary to establish a claim for equitable fraud. Equitable fraud refers to the material misrepresentations, though innocent or unintentional, on which an action might be maintained in equity to rescind a consummated transaction. See *People v Credit Suisse (USA) LLC* 31 NY3d at 622 at 639.

Brown argues that the complaint merely recites the elements of equitable fraud without particular -- without further particularity indicating which misstatements or omissions were fraudulent, which specific defendant made the actionable representations. Why the investors reliance was justifiable or the resulting transactions were inspired by the misrepresentations.

Defendant here is incorrect again. The complaint, to this Court's reading, details Brown's involvement in ongoing and persistent fraud. Again, assuming the truth of the allegations asserted in the complaint. Accordingly, motion sequences 11 and 12 are denied.

With respect to motion sequence 13. This Court has already rejected Katz's statute of limitations argument. Defendant Katz additionally alleges that the amended complaint fails to allege the Katz defendants' fraud was sufficiently detailed and therefore each of the four types of fraud causes of action as asserted against Katz must be dismissed.

This argument is rejected. First, the amended complaint explains how the Katz defendants, through their control of Cardis bank accounts, assisted defendant Fischman in siphoning over $3 million in investor payments through fraudulent payments to Choshen. The fact Fischman controlled Cardis did not afford him the right to disperse funds for his own personal use. See *Gallagher v United States* at 2018 Westlaw 314-8355 Eastern District Court, 2018, rejecting the argument in the securities fraud case that a manager of a company had the right to take the money for his own use.

Nor can it be argued on the facts alleged in the amended complained that these payments were legitimate. The amended complaint alleges over $3 million in payments to Choshen for a non-revenue generating company. No written agreement to justify the payments; payments in wholly irregular amounts and timing; and that the payments were used for personal expenses. Under these

circumstances the payments could be at trial determined to be fraudulent. See *Vance v DePalo* at 2016 Westlaw 1324183 at *3 *4, where the Supreme Court in a civil forfeiture action found substantial probability of success on the merits of a claim of fraud based on diversion of investor assets through phony payments for consulting services.

Second, the amended complaint details the Katz defendants' assistance in fraudulent payments to Fischman family members and charities, none of whom had any right to the money, according to the amended complaint. And specifically alleges the amounts misappropriated to each. See *Nnebe v United States* at 2005 Westlaw 427534 at *3 is vacated and remanded at 534 F.3d, 87. A securities fraud conviction where money was misappropriated and not used primarily for legitimate business purposes as promised.

See *People v Sala* 258 AD2d 182 at 94, confirmed at 95 NY2d, 254. The Court found that the failure to disclose commissions and fees violated the Martin Act. See *Knox LLC v Lakian* 2018 Westlaw 4278399 at *2 and 10, where the New York Supreme Court found that diversion of investor monies constituted fraud. The motion notably makes no claim these payments were appropriate.

Third, the amended complaint describes how the Katz defendants themselves allegedly misappropriated Cardis' money to fund defendant Katz's own personal

expenses and provides for, in detail, tracing the accounts of defendants' alleged theft of Cardis funds, see *United States v Kuperman*, 288 F. App'x 740. That case describing a federal securities fraud conviction based on diversion of investor funds, quote, "for personal use and benefit." For example, the amended complaint alleges that in September of 2014 Defendant Katz transferred $40,000 from the Katz IOLA account maintained at Bank of America to a Chase -- into a JP Morgan Chase account in the name of the Law Offices of Lawrence Katz IOLA Trust Account. With the particular account number identified.

Or in October of 2014 the Defendant Katz received $100,000 from a Cardis investor and deposited it into the JP Morgan Chase account specifically identified by number in the names of Law Offices of Lawrence Katz IOLA Trust Account. And over the month he withdrew $5,840.81 from the account all of which appear, according to the amended complaint, to be for personal expenses. These include Target, Costco and a local supermarket. Or for example, there is an allegation that in May of 2016 defendants' Katz transferred $50,000 from the Katz IOLA account maintained at Bank of America to a Signature Bank account bearing the name Law Offices of Lawrence Katz Esquire PLLC IOLA account. Over that month alone defendant Katz appears to have spent over $5,000 on

personal expenses, including Urban Outfitters, Costco and Victoria Secret. These allegations are more than adequate to give the Katz defendants notice of the claims against them. And given that the amended complaint must merely allege facts sufficient to permit a reasonable inference of the alleged conduct, see *Pludeman v Northern Leasing Systems Inc*. At 10 NY3d, 486 at 492. See also *House of Spices (India) v SMJ Services Inc*. at 103 AD3d, 848 at 851.

Finally, the Katz defendants refer to their IOLA accounts as escrow accounts and argue that there is nothing to indicate that they did anything but follow the lawful directions of their clients.

As an initial matter, there is no escrow agreement alleged in the amended complaint. And the Katz defendants offer no evidence to support the claim that they were escrow agreements, that the accounts were escrow agreements or that they followed the lawful directions of their clients. There is nothing to support the defense, this defense. It is, in any event, a factual defense that is inappropriate on a motion to dismiss. See *511 West 232nd Street Owner's Corp. v Jennifer Realty Co*. at 98 NY2d, 144 at 151-152. The Court recognized that on a motion to dismiss the Court must accept as true the facts alleged in the complaint. Katz defendants' motion is

therefore dismissed.

Motion sequence 15 is advanced by Defendant Rosenblatt. According to the amended complaint, the Defendant Rosenblatt was a significant contributor to the Cardis fraud. Allegedly Rosenblatt distributed false investor update letters and helped perpetrate the scheme through direct interactions with investors via e-mail and telephone.

Rosenblatt advances three arguments as to why the complaint face as against him. First, he argues that the complaint was not timely filed. This argument was already addressed and rejected.

Next, Rosenblatt argues the motions fail to state a -- excuse me. Next, Rosenblatt argues that the amended complaint fails to state a causal action and that it is insufficiently particular.

Finally, he argues that the amended complaint fails to join a necessary party.

Each of these arguments is rejected. The amended complaint adequately alleges each claim against Rosenblatt. Rosenblatt is named in four counts of the amended complaint: Counts one, three, five, and six. Each of the counts sufficiently states a cause of action.

Count one alleges that Rosenblatt violated the Martin Act. The Martin Act authorizes the Attorney

General to prosecute fraudulent practices in connection with securities and only requires fraudulent conduct be material. See *People v Greenberg* 946 NY Supp.2d at 1 at 8. Here the amended complaint plainly alleged -- alleges a Martin Act claim and alleges that Rosenblatt was a key participant in material and fraudulent conduct. See the amended complaint paragraphs 143 through 151.

Count three alleges that Rosenblatt violated Executive Law Section 63(12). Executive Law Section 63(12) authorizes suit for repeated fraudulent or illegal acts or persistent fraud in the illegality in the carrying on, conducting or transaction of business. Plainly the amended complaint alleges repeated and persistent Martin Act violations, acts of fraud and equitable fraud through Rosenblatt's participation in the long running Cardis fraud. See amended complaint at paragraphs two, 33, and 143 through 151.

Count five alleges that Rosenblatt committed actual fraud. The actual fraud claim requires, as the Court has stated, four material misrepresentations, knowledge or recklessness and intent to induce reliance, justifiable reliance and damages. And see *People v Credit Suisse Securities (USA) LLC*, 31 NY3d, 622 at 638. See concurrents there. See *McMorrow v Dime Savings Bank of Williamsburgh* at 852 NY Supp.2d 345 at 346 and 347. The

amended complaint alleges each of these elements describing Rosenblatt's intentional, knowing and reckless participation in a long-running fraud and investors reasonable reliance on Cardis' misrepresentations. See the amended complaint paragraphs 31, 130, 140, 143, through 51 and 159.

Count six alleges that Rosenblatt committed equitable fraud. Equitable fraud claims only require a material misstatement and reliance. See *Credit Suisse* case, the concurrents at 31 NY3d at 639. The amended complaint alleges each of these elements for the same reason it meets the test for actual fraud.

Relevant to each of these causes of action is the following conduct which is described in detail in the amended complaint. The fraud claims advanced as against Rosenblatt are rooted in allegations that Rosenblatt had direct communications with investors and that such communications contain either material misrepresentations or material omissions. Specifically, the amended complaint alleges, for example, that in December 2014 Rosenblatt sent a group of investors a letter which he was falsely claiming. For example, that a RocNation/Cardis store was expected to go live in January/February of 2015. And a final contract was close to finalized. In actuality, the RocNation/Cardis store was not expected to

go live in January of -- in January or February of 2015 as claimed. And the final contract was not close to finalized. That Cardis was finalizing an agreement with ByStorm Entertainment to be its exclusive payment system, it would go live in late January, 2015. In actuality, the amended complaint alleges Cardis was not finalizing any agreement with ByStorm to be its exclusive payment system. The companies only had one introductory meeting the amended complaint alleges.

Further, another example, Cardis says, quote, "is in advance negotiations to become the payment processor for Primary Way." In actuality, according to the amended complaint, Primary Way never entered into any negotiations with Cardis.

Additionally, the alleged -- the amended complaint alleges that Rosenblatt had direct false communications with investors in the following circumstances: On October 18 of 2013 Defendant Rosenblatt wrote the following to an investor. Quote. "We at Cardis now believe that the company will be doing an IPO within the next 12 months. We are signing some more major contracts in the next coming weeks." These statements, the amended complaint alleges, were false because no IPO was on the horizon and Cardis did not expect or did not certainly reasonably expect to sign major contracts in the

coming weeks.

Another example, March 18 of 2015, Defendant Rosenblatt falsely represented that Cardis was, quote, "finishing up the RocNation contract and should be signed by next week."

Another example, on or about September 24 of 2015 Defendant Brown and Defendant Rosenblatt e-mailed a disgruntled investor that a lawsuit claiming fraud was, quote, "frivolous," while claiming that Cardis' relationship with RocNation was, quote, "developing," and ongoing.

Based on these allegations, it is clear that the amended complaint details Rosenblatt's role in the Cardis fraud in a way that satisfies CPLR 3016(b), which of course is the particularity requirement.

Moreover, the amended complaint details specific investors who detrimentally relied on the false statements in the investor update letters disseminated by Rosenblatt. See the amended complaint at paragraph 140.

It also describes other investors who detrimentally relied on Cardis' false representations and omissions. See the amended complaint at paragraphs 130, 154 and 155.

Rosenblatt could be found to be liable for this conduct as a participant in the Cardis scheme. See *CPC*

International Inc. v McKesson Corporation 70 NY2d, 268 at 286. The Court of Appeals there recognizing that the defendant was liable for conduct of co-conspirators that were in furtherance of a conspiracy.

Finally, Rosenblatt argues that the amended complaint -- amended complaint's references to certain third parties make them necessary parties to this action. This argument is rejected. First, Rosenblatt ignores the fact that the Attorney General, chief law enforcement of the State of New York, brought this action pursuant to two laws, Martin Act and the Executive Law that accord only the Attorney General standard to prosecute this civil action.

Second, even if this were a private action, Rosenblatt fails to establish that dismissal would be an appropriate remedy under the CPLR. Under CPLR 1001(a), necessary parties to an action or proceeding fall into two distinct categories. Persons who ought to be parties if complete relief is to be accorded between persons who are parties to the action. Or, who might be inequitably affected by judgment in the action. See *27th Street Block Association v Dormitory Authority of State of New York* at 752 NY Supp.2d, 277 at 281. And even where a party is deemed necessary, dismissal is a last resort.

Here, Rosenblatt offers nothing to establish

that there are any third parties necessary to obtain complete relief or that there are third parties who would be inequitably impacted by judgment in this action. Nor does Rosenblatt undertake the analysis required to justify the last resort of dismissal. There is no basis to dismiss the amended complaint based on Rosenblatt's arguments.

The Court is satisfied that the amended complaint that is presented offers particularized statements that puts each defendant individually on notice of what it is he or it is accused of having done that could violate the Martin Act or the Executive Law or result in a verdict of fraud, actual or equitable. The level of detail that is offered in the amended complaint, the Court believes, is not confusing in any manner. And to the extent that their -- that each defendant would like to further inquire as to the specific allegations with respect to them, or raise defenses based on areas of perceived weakness in the amended complaints, they are free to do so in the course of discovery. And they are free, of course, to move to have this matter dismissed at the end of discovery by way of motion for summary judgment. But the Court is satisfied that the complaint here -- amended complaint here is sufficiently detailed and specific as to the allegations and claims against each

of the defendants as to allow it to proceed and have the matter proceed through discovery.

Accordingly, it is hereby ordered that each of the motions presented to the Court today, motion sequence 11, motion sequence 12, motion sequence 13, and motion sequence 15 are all thus hereby ordered denied.

I direct that the movants order a copy of the transcript of today's proceedings and present it to the clerk of Part 43 for so ordering. Any party may, for their own purposes, order a copy of the transcript and present it as they choose. But the direction here is that the moving parties jointly, and the Court will issue a short form gray sheet order simply denying each of the motions today. The transcript will serve as the basis for the Court's decision in case anyone seeks further remedies from that.

I'll direct that the -- any answers be filed within 30 days of -- well, within 20 days of the date of the notice of entry of this Court's order.

The record is closed.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

MICHELE PANTELOUKAS
SENIOR COURT REPORTER

mlp